(1)

Supreme Court, U.S.
FILED

No. 94- 931521 MAR 2 8 1994

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

LINDA A. SETLECH,

Petitioner,

v.

UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE, UNITED STATES DEPARTMENT OF THE TREASURY, UNITED SATES DEPARTMENT OF EDUCATION, NEW YORK STATE HIGHER EDUCATION AND SERVICES CORPORATION, and COLUMBIA UNIVERSITY,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Petitioner Pro Se

February 26, 1994

108 pp

QUESTIONS PRESENTED

(1) May an appellate court properly affirm a summary judgment order which (a) sanctioned the powers of taxation, U.S.C.A. Const. Art. I, § 8, and Amend. XVI, to be used administratively to search, seize and redistribute federal and state income tax refund monies for nontax debt; and, (b) if so, seize such monies from some, but not all, members of a class of Student Loan Defaulters ("SLDs") in a selective civil enforcement procedure so as to measure the effects of offset, such as nontax filing behavior, thereby establishing the administration's future goal to pursue such SLDs in a criminal and punitive fashion as tax evaders, as documented in the United States General Accounting Office Report to Congressional Requesters, entitled TAX POLICY Refund Offset Program Benefits

Appear to Exceed Costs ("Tax Policy"), May 1991 (195a) (197a, 198a, 203a, 204a, 221a, et seq.), notwithstanding the patent violation of the due process and equal protection provisions of U.S.C.A. Const. Amendments XIV and IV?

(2) Is it proper for an appellate court to affirm a summary judgment order which holds key that the Department of Education ("DOE") was not required to give actual, or active, notice to a taxpayer, but, rather, notice as "reasonably calculated under all of the circumstances to apprise interested parties of the pendency of the action" (301a), when such passivation failed to provide taxpaying petitioner with the opportunity to present actual objections to (a) the unreasonable search, seizure and redistribution of federal and state income tax refund monies for nontax

debt, and (b) the probable cause therefor, i.e., a defaulted, but hazardous, open-ended student loan, in violation of U.S.C.A. Const. Amend. IV?

(3) Was it proper for the court below to affirm summary judgment based upon a self-serving affidavit (108a) which failed to exhibit conclusory proof that the "Warning Notice to Defaulters" (121a), as a significant geniune triable issue pursuant to 31 U.S.C.A. § 3720A, had in fact been mailed to petitioner's last known current address to guarantee thereby a minimum standard of reasonable foreseeability and standing to sue in accordance with U.S.C.A. Const. Amends. V and XIV?

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*. **LIST OF ALL PARTIES**

The caption of the case in this Court contains the names of all parties (Linda A. Setlech and the United States of America, Internal Revenue Service, United States Department of the Treasury, United States Department of Education, New York State Higher Education and Services Corporation and Columbia University).

REASONS FOR GRANTING THE WRIT

The decision below disregards this Court's precedents prohibiting infringement upon due process, the separation of powers, and standing to sue 20

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LINDA A. SETLECH respectfully petitions this Court for a writ of certiorari to review the summary judgment order of the United States Court of Appeals for the Second Circuit filed on December 3, 1993, which affirmed summary judgment orders as to all defendants of Judge Reena Raggi for the United States District Court for the Eastern District of New York, dated July 5, 1990, October 11, 1990, and February 3, 1993, including Magistrate Judge Zachary Carter's Recommendation, dated October 23, 1992.

OPINIONS BELOW

No opinion was issued of the United States Court of Appeals for the Second Circuit and the case will not be cited or otherwise relied upon in other cases before the United States Courts of

Appeals or any other court, as noted on the face sheet of summary judgment order, dated December 3, 1993, Appendix A1. There was no published opinion of the United States District Court for the Eastern District of New York at Brooklyn, except that which was contained in Judge Reena Raggi's Memorandum and Order, dated February 3, 1993.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was filed on December 3, 1993. Appendix A. Petitioner invokes this Court's jurisdiction under 28 U.S.C.A. § 1254, 28 U.S.C.A. § 2101(c), and Rule 13 of the Supreme Court.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

At all times prior to and including March 14, 1988, the date of the postoffset notice, 31 U.S.C.A. § 3720A, provided:

> "(b) No Federal agency may take action pursuant to subsection (a) with respect to any debt until such agency-
>
> (1) notifies the person incurring such debt that such agency proposed to take action pursuant to such paragraph with respect to such debt;
>
> (2) gives such person at least 60 days to present evidence that all or part of such debt is not past-due or not legally enforceable;
>
> (3) consider any evidence presented by such person and determines that an amount of such debt is past due and legally enforceable."

At all times subsequent to March 14, 1988, 26 U.S.C. § 6402(d)(1)(C) provided:

> "... The Secretary shall --

(C) notify the person making such overpayment that such overpayment has been reduced by an amount necessary to satisfy such debt."

The Powers of Taxation Clause of Art. 1, § 8, of the U.S. Constitution provides that "The Congress shall have the Power To lay and collect Taxes ...".

The Powers of Taxation Clause of Amend. XVI of the U.S. Constitution provides that "The Congress shall have power to lay and collect taxes on incomes...".

The Search and Seizure Clause of Amend. IV of the U.S. Constitution provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause ...".

The Due Process and Equal Protection Clause of Amend. XIV, § 1, of the U.S. Constitution provides that "No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person ... equal protection of the laws."

The Deficit Reduction Act, Pub. L. No. 98-369 [H.R. 4170]; July 18, 1984, Title 31, provides:

"§ 3720A. Reduction of tax refund by amount of debt

(a) Any Federal agency that is owed a past-due legally enforceable debt (other than any OASDI overpayment and past-due support) by a named person shall, in accordance with regulations issued pursuant to subsection (d), notify the Secretary of the Treasury of the amount of such debt.

(b) No Federal agency may take action pursuant to subsection (a) with respect to any debt until such agency--

(1) notifies the person incurring such debt that such agency proposes to take action pursuant to such paragraph with respect to such debt;

(2) gives such person at least 60 days to present evidence that

all or part of such debt is not past-due or not legally enforceable;

(3) considers any evidence ...

(4) satisfies such other conditions ... to ensure that ... such debt is valid ..."

such as the student loan contract.

c) Upon receiving notice from any Federal agency that a named person owes to such agency a past-due legally enforceable debt, the Secretary of the Treasury shall determine whether any amounts, as refunds of Federal taxes paid, are payable to such person. If the Secretary of the Treasury finds that any such amount is payable, he shall reduce such refunds by an amount equal to the amount of such debt, pay the amount of such reduction to such agency, and notify such agency of the individual's home address."

The Family Support Act of 1988,

September 28, 1988, Conference Report

[To accompany H.R. 1720] Agreement, VII.

Funding Provisions, provides:

"A. Temporary Extension of Program for IRS Collection of Nontax Debts Owed to Federal Agencies

(§ 901 of the House bill and § 801 of the Senate amendment.)

Federal agencies were authorized to notify the IRS that a person owed a past

due, legally enforceable debt to the agency. The IRS then was required to reduce the amount of any Federal tax refund due such person by the amount of the debt and pay that amount to the agency. The refund offset program applied with respect to debts of individuals and corporations. This program expired after June 30, 1988.

Before a refund could have been offset under this program, the agency owed the debt was required to certify to the IRS that the debtor had been notified about the proposed offset and had been given at least 60 days to present evidence that all or part of the debt was not past due or not legally enforceable. The agency also was required to enter into an agreement with the IRS prior to transmitting proposed offsets.

The conference agreement extends the tax refund offset program through January 10, 1994, effective on the date of enactment. This date enables the IRS to process potential refund offsets with respect to refunds on returns that are processed through December 31, 1993.

. . . .

The conference agreement retains the present-law requirement that the General Accounting Office, in consultation with the Secretary of the Treasury, is to report to the Congress on the effects of this program on voluntary tax compliance. ... The report is to provide and analyze data on the compliance effects of the program, such as whether taxpayers whose refunds are offset continue to file Federal income

tax returns and whether taxpayers whose refunds are offset adjust their withholding so as to create additional collection difficulties for the IRS."

STATEMENT OF THE CASE

This petition arises from a case involving the search, seizure and redistribution of petitioner's individual wealth in the form of 1987 federal, and State of California, income tax refund monies for a nontax debt. No preoffset notice was provided and the postoffset notice was improper.

a. Procedural History

Pursuant to 28 U.S.C. § 1331, petitioner filed a complaint in U.S. District Court, Eastern District of New York, No. 89-3903, which alleged that federal tax laws had been violated, in that petitioner's 1987 federal income tax refund monies had been seized in whole and redistributed for a nontax

debt, without preoffset notice and improper postoffset notice. Petitioner appeared throughout these proceedings as pro se.

Answers were received from federal defendants and Columbia University, but the State of New York appeared by notice of motion, dated March 5, 1990, to request dismissal, which was granted on June 5, 1990.

An Initial Conference was held on May 25, 1990, before Magistrate Judge Caden to establish the scheduling order, but motions to dismiss and summary judgments were ordered and granted before plaintiff pro se had sufficient opportunity to discover what critical documentation was required to reinforce the complaint, such as the complete information list of all SLDs, including names, addresses, age, sex, income, marital status, ethnicity, race,

religion, political persuasion, native or foreign, and any other criteria which might demonstrably reveal how the government determined which group of SLDs would not be offset and thus represent the control group, and which SLDs would be offset, in whole or in part, with and without notice, and thereby represent the variable group of class members of SLDs in which petitioner, a Mid-West American white female, single, born 9/29/42, low income, Protestant, English major from Columbia University, was such a member.

Without such data, petitioner would have to speculate as to how the government selected some SLDs for seizure and redistribution of federal income tax refund monies, but not others, in order to make a claim of discrimination and prejudice, which would have been misleading and

inaccurate.

Another scheduled conference was set for September 25, 1990, which was adjourned to October 12 and adjourned again to November 1, 1990.

In the interim, Columbia University moved and obtained dismissal by order, dated October 18, 1990, and entered on October 26, 1990.

No examinations before trial were conducted. When petitioner served a subpoena duces tecum on federal defendants, no response was received; it was deemed as time barred.

On December 4, 1990, petitioner filed an Application for Appointment of Counsel which was rejected by Magistrate Judge John L. Caden on January 18, 1991.

On July 3, 1991, petitioner filed Reply Affidavit as well as federal income tax returns in the district court without execution or payment as a

Declaration of Protest to such court order which denied petitioner legal representation.

The government's motion for summary judgment was due on February 5, 1991, and petitioner's response was filed on April 5, 1991. The government's motion was transferred from Magistrate Judge Caden to Magistrate Judge Carter, and on February 3, 1993, the court granted motion for summary judgment to federal defendants.

On appeal, Setlech v. USA, et al., the Court of Appeals affirmed the lower court's decision, without opinion, decision or comment, and issued summary judgment order, dated December 3, 1993.

The jurisdiction of the court below under 28 U.S.C. § 1331. The district court's jurisdiction was properly invoked in this case under 28 U.S.C. § 1331, in that the action

concerns a federal legal question whereby plaintiff's individual federal income tax refund monies for taxable year 1987 in the total sum of $2,473.00 were searched, seized and redistributed, in whole, to a third-party, for nontax debt and no probable cause.

The district court's jurisdiction also was properly invoked under 26 U.S.C. § 1 because federal tax laws and violations thereof are involved, particularly 31 U.S.C. § 3720A, which requires (1) 60-day preoffset notice and (2) postoffset notice.

The jurisdiction of the court below rested upon 28 U.S.C. § 1291 and Fed.R.App.P. 3 and 4 and was timely invoked by Notice of Appeal filed on March 8, 1993, within thirty days of the entry of judgment.

b. Statement of Facts

In district court, petitioner

sought to complain solely of the government's failure to provide the pre-requisite 60-day preoffset notice, as well as the proper and timely post-offset notice. The court, however, opened the door to the issue of student loan contracts, upon which basis the seizure and redistribution of federal income tax refund monies occurred. Repeatedly the court asserted throughout the proceedings that petitioner had not disputed the indebtedness evidenced on such student loan contracts. Finally, petitioner wrote Judge Raggi (84a) and requested an independent court reporter to record petitioner's dispute as to such indebtedness, which Judge Raggi denied. Nevertheless, the denial serves to record petitioner's dispute as to the indebtedness.

"...If Your Honor will recall, you specifically asked me during the proceedings on Friday, May 18, 1990, if I owed the money in question, to which I

replied, 'No, ...', and such response should have been so noted..."

"Request to have court proceedings recorded by other than official court reporter staff is denied.

Reena Raggi
USDJ 9/19/90"(85a)

The student loan contracts were at all times hazardous, open-ended, and executed during a period of emotional and mental incompetency. The court was advised that in or about 1975 the Office of Vocational Rehabilitation ("OVR") provided total funding for petitioner's remaining education, which included all tuition costs, fees, books, supplies and a small living allowance. In order to qualify for such federal funding, petitioner was required to have a psychiatric evaluation which included petitioner's past and present accounts. The medical results and other supporting documentation of OVR are within the purview and possession of federal

respondents, not petitioner. Federal respondents did not wish to proceed to acquire the data for the Court or in response to petitioner's subpoena duces tecum because the time for discovery had expired.

31 U.S.C.A § 3720A states that "any evidence" presented should be considered, but the district court failed to consider substantive documentation which petitioner had produced to support her statements of mental and emotional incompetency at the time student loan contracts were executed, to wit, death records of petitioner's father by patricide, deemed justifiable homicide, which petitioner witnessed at age 6, death record of Peoria County Judge Vonachen immediately following the guilty verdict in petitioner's paternity action, legal records of paternity matter, academic

records of petitioner's son in Grade 8 which confirmed his expulsion from Horace Mann prep school for lack of economic resources while petitioner was an employee at Columbia University and his transfer to Peoria Trewyn Junior High School, as well as employment records subsequent to graduation to reflect severe lack of equal employment opportunities and underemployment positions, such as an office messenger for Caterpillar Tractor Co. in 1978.

On November 30, 1993, at the oral hearing in the court below, petitioner broached the subject of retroactive application of 31 U.S.C.A. § 3720A for purposes of comparing the state's monetary interests to those of civil rights and liberties for individuals. For example, in Pension Ben. Guar. Corp. v. R.A. Gray & Co., 104 S.Ct. 2709 (1984), 2709-2720, this Court held that

a five-month retoractive application did not violate the Due Process Clause of the Fifth Amendment.

In petitioner's case, the Deficit Reduction Act enacted in 1984 has been retoractively applied for more than approximately 13 years when student loan contracts were first executed.

In contrast, petitioner has been time barred to complain against Columbia University for educational malpractice, lack of equal employment opportunities, or to seek relief from 18 U.S.C.A. § 1201 regarding the forcible use of illicit drugs, kidnapping and rape of petitioner while visiting the campus in 1980 upon invitation.

The trial court also stated in its order for summary judgment, affirmed by the court below, that no medical data had been provided to support petitioner's claim of mental and

emotional incompetency, but at least one form of medical documentation was attached to petitioner's request for appointment of legal counsel which the district court failed to review and respond thereto. At no time did the court decide, order or recommend to petitioner to obtain such documentation for the court's consideration of past claims.

At the oral hearing in the United States Court of Appeals on December 3, 1993, petitioner retained the services of an independent court reporter pursuant to the Notice to the Bar, who then refused to transcribe the mechanical shorthand notes of the hearing for inclusion in the record on appeal. Such notes should reflect petitioner's speech patterns during intense personal stress and fatigue. This matter is scheduled to be heard in

Small Claims Court on March 2, 1994, the date on which this Petition is due.

REASONS FOR GRANTING WRIT:

The decision below disregards this court's precedents prohibiting infringement upon due process, the separation of powers, and standing to sue.

The government's evidence, which was structured as an affidavit (301a), tended to show that petitioner had in fact received preoffset "Warning Notice to Defaulters" (121a) at her last known address, pursuant to 31 U.S.C.A. § 3720A, from the administrative agencies and departments warning petitioner that her federal and state income tax refund monies were subject to seizure and redistribution for nontax debt, which first occurred on or about September 1969 and last occurred on or about May 1975.

To enforce the Due Process Clause

of the Fourteenth Amendment, the government had a duty to provide reasonable notice, as well as an opportunity to be heard.

In Mullane v. Central Hanover Tr. Co., 339 U.S. 306 (1950), the court stated:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

It further stated:

> "... when notice is a person's due, process which is a mere gesture is not due process...."

See, also, Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983).

Since 31 U.S.C.A § 3720A developed from the 1984 Deficit Reduction Act and has little, if any, precedented case law, the governmental administrative

agencies would have this court deny petitioner due process on the basis that notice was reasonably sent to the last known current address, not in 1984, 1985, 1986, 1987 or in 1988, when the search, seizure and redistribution of federal, and state, income tax refund monies for nontax debt occurred, but, rather, to petitioner's last known current address in 1983.

Petitioner's tax records are substantive evidence that if the administrative's affidavit attesting to service of a 60-day preoffset notice, upon which the federal and state governments rested and the court below relied had in fact truly been sent in compliance with 31 U.S.C.A. § 3720A to petitioner's last known address in 1988, such 60-day preoffset notice requirement would have been forwarded to the 1988 address, to wit, 11609 Ohio, Apt. 4, Los

Angeles, California 90025.

In Welch v. Henry, 305 U.S. 134 (1938), the court stated:

> "In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and so oppressive as to transgress the constitutional limitation."

The court below affirmed summary judgment and denied petitioner with due process and standing to sue, even though petitioner has also shown that the postoffset notice required by 26 U.S.C. § 6402(d)(1)(C) was improper.

The administration's postoffset notice, dated March 14, 1988 (46a), was forwarded to petitioner's future address, i.e., P.O. Box 912, Peoria, Illinois 61653-0912. Petitioner advised the administrative agency that such address would become effective AFTER April 1, 1988 (44a). Thus, the

government had from March 14, 1988, the date of its postoffset notice, to April 1, 1988, to mail such notice to petitioner's Los Angeles, California address which was the last known current address on March 14, 1988.

Such mailing would have prevented petitioner from incurring the stigmatizing injury of terminating permanent employment, vacating her residence, placing all possessions and home furnishings in storage, and travelling 2,000 miles by car to discover in Peoria, Illinois that no tax refund monies were available for relocation expenses. Petitioner was homeless and proceeded to New York to reside with her son in the apartment she presently occupies.

In Allen v. Wright, 104 S.Ct. 3315 (1984), the court stated that the injury had to be fairly traceable to the

government's conduct that was challenged as unlawful.

The court below rendered no opinion or decision as to its affirmation of summary judgment. However, in Tulsa Professional Collection Services, Inc. v. JoAnne Pope, Executrix of the estate of H. Everett Pope, Jr., Deceased, 108 S.Ct. 1340 (1988), the court held:

> "...if appellant's identity as a creditor was known or 'reasonably ascertainable' by appellee (a fact which cannot be determined from the present record), the Due Process Clause of the Fourteenth Amendment, as interpreted by Mullane and Mennonite, requires that appellant be given notice by mail or such other means as is certain to ensure actual notice..."

The court below disregarded this Court's precedent when it stated:

> "... the key issue before the court is whether DOE gave notice 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action', not whether plaintiff received actual notice." (Appx. C1, C4)

CONCLUSION

For the foregoing reasons, petitioner, SETLECH, prays this Court to grant her petition for a writ of certiorari to review and reverse summary judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

LINDA A. SETLECH
Petitioner, Pro Se

February 26, 1994

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 89-3903 (RR)

LINDA SETLECH,

Plaintiff,

-against-

UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE, UNITED STATES DEPARTMENT OF THE TREASURY, UNITED STATES DEPARTMENT OF EDUCATION, NEW YORK STATE HIGHER EDUCATION SERVICES CORP., and COLUMBIA UNIVERSITY,

Defendants.

MEMORANDUM AND ORDER

Before: Reena Raggi,
District Judge

Appearances:
Linda A. Setlech, Plaintiff Pro Se
Hon. Robert Abrams, Atty. General
State of New York,
By: Anne Ehrenkranz, Esq.
Assistant Attorney General

Plaintiff Linda Setlech attended Columbia University at some unspecified time, her education financed, at least in part, through federal and state loan programs. When she defaulted on these loans, the Internal Revenue Service ("IRS"), in 1988, applied her 1987 federal income tax refund of $2,473.00 to the debts.[1] Ms. Setlech now sues the IRS, the Department of Education, the New York State Higher Education Services Corporation ("NYSHESC"), and Columbia University seeking money damages for injuries sustained as a result of this

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1 This "tax intercept" program is provided for in the Deficit Reduction Act of 1984, two provisions of which, 31 U.S.C. § 3702A(sic) and 26 U.S.C. 6402, permit monies owed on federally insured and unpaid student loans to be deducted from a debtor's federal income tax overpayment and credited to the Department of Education.

action.[2] She does not dispute her indebtedness. Rather, she claims acute emotional and financial injuries caused by defendants' failure to provide her with the notice required by 31 U.S.C. § 3720A(b).[3]

NYSHESC moves for dismissal of the complaint in reliance on the eleventh amendment. This motion is hereby granted.

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[2] Ms. Setlech also sues the Department of Education for pursuing a politically-defined education policy focusing on realism rather than idealism, and Columbia University for failing to provide her with a truly liberal arts education and for failing to ensure her personal safety.

[3] Before referring any debt to the IRS, the Department of Education is required by law to notify the debtor of the intended referral and to give the debtor at least sixty days to present evidence that all or part of the debt is not past-due or legally enforceable.

Discussion

The court reads plaintiff's pro se complaint liberally and, for purposes of resolving this motion, accepts all facts alleged therein as true. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Ad-Hoc Comm. v. Baruch College, 835 F.2d 980, 982 (2d Cir. 1987). Thus, it assumes that no timely notice of debt referral was given to plaintiff and that her 1987 tax refund was eventually forwarded by the IRS to NYSHESC as the state agency responsible for administering federally-insured student loans in New York.[4] Nevertheless, dismissal is mandated by controlling legal authority. See Morales v.

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[4] In fact, the Department of Education, in its answer, denies that late notice was given or that the refund was redistributed to NYSHESC. It does admit that the 1987 refund was credited to the Department of Education.

New York State Dep't of Corrections, 842 F.2d 27, 30 (2d Cir. 1988) (citing Cameron v. Fogarty, 705 F.2d 676, 678 (2d Cir. 1983), cert. denied, 481 U.S. 1016 (1987)).

The eleventh amendment to the United States Constitution prohibits federal courts from entertaining suits "brought by private parties against a State without consent given." Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 98 (1984) (quoting Ex parte State of New York, 256 U.S. 490, 497 (1921)). This immunity can extend to state agencies, id. at 100, particularly when judgments obtained against them would have to be satisfied out of the state treasury, Edelman v. Jordan, 415 U.S. 651, 663 (1974); Feeney v. Port Authority Trans-Hudson Corp., 873 F.2d 628 (2d Cir. 1989); Trotman v. Palisades

Interstate Park Comm'n, 557 F.2d 35, (2d Cir. 1977).

The statutory scheme creating the NYSHESC warrants treating that agency as the "alter ego" of the State of New York. The NYSHESC was established "[t]o coordinate the state's administrative effort in student financial aid and loan programs with those of other levels of government." N.Y. Education Law § 652(2)(b) (McKinney 1988). To further this end, it is required to submit to the governor and the legislature an annual budget request, which is "subject to approval... as part of the executive budget." Id. at § 653 (2). Critical to the NYSHESC budget is an annual legislative award sufficient to cover payments to financial institutions for defaulted loans guaranteed by the agency. Id. at § 653(2)(c). For these and other monies to be expended by the

NYSHESC, vouchers must be submitted by the agency to the State Comptroller. Id. at § 660. Section 653(8), which authorizes the NYSHESC to hold property in its own name, does provide that "no obligation of the corporation shall be a debt of the state." Nevertheless, as Judge Knapp observed in finding the eleventh amendment applicable to the NYSHESC, this at best establishes that the state will not be nominally liable for the agency's debts. The overall fiscal structure of the NYSHESC makes it plain that, should the agency ever in fact be liable for any amount, the monies would indeed ultimately be paid "out of the public treasury through either appropriations or the voucher process." See McAvoy School, Inc. v. Boyer, No. 79 CV 2780 (WK) (S.D.N.Y. 1980) (unpublished memorandum and order); accord Midtown School of

Business v. Foley, 1990 U.S. Dist. LEXIS 2384 (N.D.N.Y. Fed. 26, 1990) (eleventh amendment bars suit against NYSHESC); Krienke v. NYSHESC, No. 89 CV 1123T (MAT) (W.D.N.Y. Jan. 25, 1990) (unpublished memorandum and opinion) (same); In re Goldrich, 45 B.R. 514, 518-19 (E.D.N.Y. 1984) (same), rev'd on other grounds, 771 F.2d 28 (2d Cir. 1985). Cf. Feeney v. Port Authority Trans-Hudson Corp., 873 F.2d at 631 (fiscal structure of Port Authority insulates state treasuries from its liabilities and therefore precludes finding of eleventh amendment immunity).

Plaintiff argues that application of the eleventh amendment has historically been limited to situations where the state or state agency sued is the obligor on a debt, not a creditor. The distincition -- if it exists at all -- has little relevance to this case.

Plaintiff is not suing to avoid obligations she has to the NYSHESC. She is suing to recover money damages for injuries sustained as a result of allegedly unlawful conduct. If her claims were to be found to have merit, these monies would have to be paid out of the state treasury. The eleventh amendment is squarely applicable to such a situation.

Moreover, although plaintiff correctly points out that the eleventh amendment does not prohibit state officials from being sued in their personal capacities, see, e.g., Scheuer v. Rhodes, 416 U.S. at 237; Dube v. State University of New York, 900 F.2d 587, 595 (2d Cir. 1990); Farid v. Smith, 850 F.2d 917, 920-23 (2d Cir. 1988), this line of cases is of little assistance to her in opposing the motion of a state agency, as opposed to an

individual, for dismissal. The court does not here address plaintiff's contention that she may seek to amend her complaint to add individual state employees as defendants. The pending motion is one for dismissal of the complaint as against the NYSHESC. Plaintiff has proposed no amendment that would cast that motion in a different perspective.

The court turns to the only remaining question: whether New York State or the NYSHESC has waived eleventh amendment immunity. Such waiver is not lightly inferred. It must be stated in "the most explicit language or by such over-whelming implication from the text as [will] leave no room for any other reasonable construction." Atascadero State Hospital v. Scanlon, 473 U.S. 234, 240 (1985) (quoting Edelman v. Jordan, 415 U.S. at 673, quoting Murray v.

Wilson Distilling Co., 213 U.S. 151, 171 (1909)), reh'g denied, 478 U.S. 926 (1985)). Moreover, any waiver must "specify the State's intention to subject itself to suit in federal court," and not simply its consent to be sued in its own courts. Id. at 241 (emphasis in original).

N.Y. Education Law § 653(4) does contemplate suits brought by or against the NYSHESC in connection with loans "made or guaranteed by it which [are] in default." Indeed, venue for such actions is expressly provided for in Albany County for suits in which the NYSHESC is named as a defendant. This language is hardly sufficient, however, to constitute a waiver of immunity for § 1983 actions brought in federal court against the agency. See Atascadero State Hospital v. Scanlon, 473 U.S. at 241. Moreover, as the Supreme Court has

recently made clear, the fact that Congress has provided a cause of action in 42 U.S.C. § 1983 against persons who, under color of state law, violate federal rights, does not limit in any way the immunity afforded "States or governmental entities that are considered 'arms of the State'" by the eleventh amendment. See Will v. Michigan Dep't of State Police, __ U.S. __, 109 S.Ct. 2304, 2311 (1989).

Plaintiff argues that waiver should, nevertheless, be inferred from NYSHESC's participation with federal agencies in joint state/federal programs. Federal law does clearly provide that the tax intercept program "does not preclude any legal, equitable, or administrative action against the federal agency to which the amount of such reduction was paid." 26 U.S.C. § 6402(e); see also Richardson v. Baker,

663 F.Supp. 651, 654 (S.D.N.Y. 1987). But joint participation by states in this program has not precluded eleventh amendment immunity in other cases. See, e.g., Gerrard v. United States Office of Education, 656 F.Supp. 570, 572 (N.D. Cal. 1987) (eleventh amendment bars suit against California Educational Loan Program to recover tax refunds forwarded to it by the IRS on account of plaintiff's defaulted student loans); Vidra v. Egger, 575 F. Supp. 1305, 1308 (E.D. Pa. 1982) (eleventh amendment bars suit against Secretary of Pennsylvania Department of Public Welfare to recover tax refunds forwarded to Department by IRS to compensate for its payment of welfare benefits necessitated by plaintiffs' failure to make support payments); see also Nelson v. Regan, 731 F.2d 105, 110 (2d Cir.) (although eleventh amendment may bar plaintiffs

from recouping tax refunds paid by IRS to Connecticut Commissioner of Human Resources pursuant to program to compensate state for providing welfare benefits necessitated by plaintiffs' failure to pay support, it does not bar suit for injunctive relief challenging procedures by which refunds were intercepted), cert. denied, 469 U.S. 853 (1984). Accordingly, this court declines to find waiver of immunity from the joint federal/state conduct alleged in this case.

Conclusion

The motion of NYSHESC to dismiss plaintiff's complaint seeking money damages against it for alleged injuries sustained in connection with her 1987 income tax refund is granted.

SO ORDERED.

Dated: Brooklyn, New York
July 5, 1990

s/Reena Raggi
REENA RAGGI
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 89-3903 (RR)

LINDA SETLECH,

Plaintiff,

-against-

UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE, UNITED STATES DEPARTMENT OF THE TREASURY, UNITED STATES DEPARTMENT OF EDUCATION, NEW YORK STATE HIGHER EDUCATION SERVICES CORP., and COLUMBIA UNIVERSITY,

Defendants.

MEMORANDUM AND ORDER

Before: Reena Raggi,
District Judge

Appearances:
Linda A. Setlech, Plaintiff Pro Se
Hon. Andrew J. Maloney, U.S. Atty.
Eastern Dist. of New York
By: Warren Ausubel, Esq.
Barry, McTiernan & Moore
By: Richard W. Wedinger, Esq.

Linda A. Setlech, proceeding pro se, sues defendants for various damages allegedly incurred in the course of her education, which was financed, at least in part, through federal and state loan programs. Specifically, she complains that the Internal Revenue Service failed to provide her with the notice required by 31 U.S.C. § 3720A(b) before applying her 1987 federal income tax refund to her defaulted student loans. Columbia University is not directly sued in connection with plaintiff's income tax refund, the claim giving rise to federal question jurisdiction. 18 U.S.C. § 1331 (1988). Instead, plaintiff sues Columbia as a pendent party for failing to provide her with a truly liberal arts education and for failing to ensure her personal safety.

Columbia now moves to dismiss the complaint against it, pursuant to Fed.

R. Civ. Proc. 12(b)(3) and 12(b)(6). It contends that the exercise of pendent party jurisdiction is inappropriate in this case. Moreover, it contends that plaintiff's claims are well outside any applicable statutes of limitations.

The question of pendent party jurisdiction is a complex one, since such jurisdiction is available "only if the statute providing federal jurisdiction over the primary claim can also be interpreted as specifically conferring jurisdiction over other claims against additional parties." Roco Carriers, Ltd. v. M/V Nurnberg Express, 899 F.2d 1292, 1295 (2d Cir. 1990) (citing Finley v. United States, 109 S. Ct. 2003, 2008-09 (1989)). This decision can sometimes turn on such points as whether a Congressional grant of jurisdiction is over an "action" or a "claim" or a "case." See Roco Carriers,

Ltd. v. M/V Nurnberg Express, 899 F.2d at 1296. At least one court has declined to entertain a state action against a pendent party when the jurisdictional grant invoked is, as in this case, 28 U.S.C. § 1331. Hall American Center Assocs. v. Dick, 726 F. Supp. 1083, 1101 (E.D. Mich. 1989). This court need not address the issue in this case, however, since other grounds support dismissal.

Plainly, plaintiff's claims are untimely. The claim that Columbia failed to provide her with a liberal arts education, if cognizable at all under New York law, necessarily sounds in either contract or malpractice. The former would require suit to be commenced within six years, N.Y. Civ. Proc. L. & R. § 213 (McKinney 1990); the latter, within three years, N.Y. Civ. Proc. L. & R. § 214 (McKinney 1990).

Plaintiff graduated from Columbia on May 18, 1977. Her complaint, however, was not filed with this court until November 21, 1989, well outside even the longer statutory period.

Similarly, her claim that Columbia's negligence in caring for her safety resulted in her 1980 rape on campus, would require suit to be filed within either the three-year period provided for negligence actions, N.Y. Civ. Proc. L. & R. § 214 (McKinney 1990), or the one-year period provided for assault, N.Y. Civ. Proc. L. & R. § 215 (McKinney 1990). The filing of a complaint in 1989 fails to comply with either of these statutory limitations periods.

Confronted with Columbia's motion and the legal arguments in support, plaintiff chose not to file papers in opposition. Under this court's local

civil rule 3(b), such a failure can be deemed sufficient cause to grant the motion by default. Plaintiff did, however, appear for oral argument on October 5, 1990 and there advised the court that she would not oppose dismissal.

Accordingly, because plaintiff's claims against Columbia are untimely and because she has advanced no argument to the contrary, the motion for dismissal of the complaint insofar as it is brought against Columbia University is granted.

SO ORDERED.

Dated: Brooklyn, New York
October 11, 1990

s/Reena Raggi
REENA RAGGI
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 89-3903 (RR)

LINDA SETLECH,

Plaintiff,

-against-

UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE, UNITED STATES DEPARTMENT OF THE TREASURY, UNITED STATES DEPARTMENT OF EDUCATION, NEW YORK STATE HIGHER EDUCATION SERVICES CORP., and COLUMBIA UNIVERSITY,

Defendants.

MEMORANDUM AND ORDER

Before: Reena Raggi,
District Judge

Appearances:
Linda A. Setlech, Plaintiff Pro Se
Hon. Mary Jo White, U.S. Atty.
Eastern Dist. of New York
By: Warren Ausubel, Esq.

For the reasons stated therein, the court hereby adopts in full the Report and Recommendation of Magistrate Judge Zachary W. Carter, dated October 23, 1992 ("Report and Recommendation"), and grants summary judgment in favor of defendants United States of America, Internal Revenue Service, United States Department of the Treasury, and United States Department of Education ("DOE"). The court writes only to address objections to the Report and Recommendation raised by plaintiff, Linda Setlech.

Ms. Setlech argues that her student loans, on which defendant DOE is trying to collect and which underlie her action, are unenforceable because she was mentally incompetent at the time she entered into these transactions. Ms. Setlech, who received a Bachelor of Arts in English Literature from Columbia

University in 1977 and has apparently been accepted to graduate teaching programs at both Teachers College of Columbia University and New York University, has not, however, come forward with any evidence regarding her mental or medical condition as required by Federal Rule of Civil Procedure 56(e). For example, she has not submitted any affidavit from a licensed physician, psychiatrist, psychologist, or other potential expert witness attesting to her mental incompetency at the time she signed her loan agreements. Neither has she produced any contemporaneous hospital or other medical reports, nor any adjudication of incompetence. Conclusory statements are not sufficient to raise a genuine issue of material fact as to plaintiff's competency. See Thompson v. Gjivoje, 896 F.2d 716, 720 (2d Cir. 1990).

Plaintiff further opposes summary judgment on the grounds that she never received 60-day pre-offset notice from DOE as required by 31 U.S.C. § 3720A (1992 Supp.). In fact, the key issue before the court is whether DOE gave notice "'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action,'" not whether plaintiff received actual notice. Gerrard v. United States Office of Education, 656 F. Supp. 570, 575 (N.D. Cal. 1987) (quoting Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 314 (1950)). The court concurs with Magistrate Judge Carter that pre-offset notice was issued by the New York State Higher Education Services Corporation, acting as agent for DOE, to plaintiff at her last known address and that such notice procedures fulfilled the due process requirements

of reasonableness. See Report and Recommendation at 10-13.

Plaintiff's reliance on Gibson v. United States, 761 F.Supp. 685 (C.D. Cal. 1991), and Ringer v. Basile, 645 F.Supp. 1517 (D. Colo. 1986), in support of her objection to the notice procedure is misplaced. In Gibson v. United States, the court held that actual notice of a tax deficiency pursuant to 26 U.S.C. § 6212 was required when the IRS failed to send notice to the taxpayer's last known address. 761 F. Supp. at 688-89. In Ringer v. Basile, plaintiff sought to quiet title in property that was subject to a tax delinquency sale. Neither case dealt with a claim of failure to receive actual notice in light of reasonable efforts to give notice.

Finally, Ms. Setlech claims that she is the victim of the government's

inequitable and discriminatory policy of collecting monies from student loan defaulters by retaining their tax refunds. Plaintiff does not allege that the government's policy is based upon any classification requiring heightened judicial scrutiny, such as race, gender, religion, or ethnic origin. Consequently, the government's policies must be reviewed under the rational basis test. See City of Cleburne v. Cleburne Living Center, 473 U.S. 431, 440-41 (1985). The court is fully persuaded that the policy of collecting on defaulted student loans by retaining tax refunds has a rational basis and is well within federal authority.

For the reasons stated herein, the defendants' motion of summary judgment is hereby GRANTED.

SO ORDERED.

Dated: Brooklyn, New York
February 3, 1993

s/Reena Raggi
REENA RAGGI
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 93-6058

FILED

LINDA A. SETLECH,

DECEMBER 3, 1993

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE, UNITED STATES DEPARTMENT OF THE TREASURY, UNITED STATES DEPARTMENT OF EDUCATION, NEW YORK STATE HIGHER EDUCATION AND SERVICES CORPORATION and COLUMBIA UNIVERSITY,

Defendants-Appellees.

Before: Kearse and Jacobs,
Circuit Judges; Meskill, Senior
Circuit Judge

JUDGMENT

ON APPEAL from the United States District Court for the Estern District of New York at Brooklyn.

THIS CAUSE was heard on the record and was argued by counsel and appellant pro se.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed substantially for the reasons stated in Judge Raggi's orders dated July 5, 1990, October 11, 1990, and February 3, 1993.

ENTERED BY ORDER OF THE COURT

s/George Lange III
George Lange III, Clerk

12/29/93
Issued as Mandated A True Copy

Attest:

s/Carol (illegible)
Chief Deputy Clerk

APPENDIX E

Supreme Court of the United States

No.

LINDA A. SETLECH,

Petitioner,

v.

UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE, UNITED STATES DEPARTMENT OF THE TREASURY, UNITED STATES DEPARTMENT OF EDUCATION, NEW YORK STATE HIGHER EDUCATION AND SERVICES CORPORATION and COLUMBIA UNIVERSITY,

Respondents.

ORDER

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on January 26, 1994, endorsed thereon the following:

"Denied, 1/26/94, CT."

William K. Suter, Clerk

By:

/s/ Melissa A. Blalock
Assistant Clerk

Dated: January 26, 1994